United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7481

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 75-7481

ODESSA CARRION,

Plaintiff-Appellant,

-against-

YESHIVA UNIVERSITY,

Defendant-Appellee.

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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1. The Court Below Should Not Have Awarded Counsel Fees Against The Plaintiff.

Assuming, arguendo, that the plaintiff's Title VII cause of action is held to have been frivolously instituted, the award of attorneys' fees was not warranted. Plaintiff's causes of action arose under 42 U.S.C. § 1983 and Title VII.

The court below awarded the defendant counsel fees on a finding that the Title VII cause of action was brought in bad faith; there is no clear finding that the same was true as to the § 1983 cause of action. Indeed, as we view the case,

the plaintiff is entitled to recover on the § 1983 cause of action regardless of her credibility. All of the elements going to liability were established beyond dispute. There was state action, there was an invasion of property and liberty rights, and there was no hearing. While the defendant may differ in the conclusions to be drawn from the record, those differences have no relation to plaintiff's credibility, nor can it reasonably be argued that her position on this issue was frivolous.

A plaintiff who institutes a lawsuit, joining together claims under § 1983 and Title VII, should not be forced to pay attorneys' fees to a defendant just because one of the causes of action is held to be frivolously instituted. To do so only serves to discourage a claimant from joining together in one lawsuit all of his causes of action, and encourages the institution of multiple lawsuits.

The defendant claims (Br., pp. 41-42) that the decision of the City Commission on Human Rights was not relevant to the good faith of the plaintiff in initiating the Title VII cause of action since the Commission's decision was reversed by the state courts, thus demonstrating, according to the defendant, that the plaintiff "was not even able to muster substantial

evidence to support the Commission's determination." (Br., p. 42). The defendant further claims that the evidence in the court below consisted of "basically the same uncreditable testimony of Mrs. Carrion as was presented before the Commission." (Br., p. 42). The defendant's argument misses the point. The City Commission found that there was substantial evidence to support the plaintiff's allegations and obviously believed the plaintiff's testimony over that offered by the defendant's witnesses. That the Commission's decision was later reversed by a state court indicates no more than that a second impartial body came to a contrary conclusion regarding the plaintiff's allegations. This clearly does not mean, as defendant argues, that "from its inception in 1967, this case was motivated by Mrs. Carrion's spleen," (Br., pp. 42-43). The Commission's decision in the plaintiff's favor demonstrates that the action she instituted in the court below was not frivolous.

2. The Dismissal of Plaintiff Constituted State Action and Deprived Plaintiff of Due Process of Law.

Initially, the defendant argues (Br., p. 45), that the court below found it unnecessary to reach the issue of state action because the plaintiff did not prove that she was "deprived of liberty or property, or that there were disputed facts requiring a hearing." However, the court below made no

findings of fact on the issue of § 1983 and hence it is impossible to tell what findings, if any, underlay its legal conclusion that the plaintiff's suspension and discharge "did not deprive her of any rights under the Constitution or laws of the United States." (Conclusion of Law No. 6).

A. State Action

The defendant claims that the termination of plaintiff's employment did not amount to state action, relying primarily upon two arguments: (1) that the state was not involved in the specific activity challenged here, i.e., the dismissal of the plaintiff (Br., pp. 56-59), and (2) that employing the "balancing" test set forth in Weise v. Syracuse University, 522 F.2d 397 (2nd Cir., 1975), leads to a finding of no state action (Br., p. 56). These arguments are without merit.

1. This court has recognized that direct state involvement in the specific challenged activity is not a sine qua non to a finding of state action. Holodnak v. Avco Corp., 514 F.2d 285, 288 (2nd Cir. 1975), Weise v. Syracuse University, supra at 407, fn. 12. See Racklin v. University of Pennsylvania, 386 F. Supp. 992, 1003 (E. D. Pa. 1974). State involvement with a "private" agency may be so great as to make the state a "joint participant in the challenged activity" Burton v. Wilmington Parking Authority, 365 U.S. 715, 725, even where the state it-

self has no direct nexus with the specific activity under attack. Indeed in Holodnak the court found state action to exist in the absence of any evidence at all that the state was in any way involved in the dismissal of the plaintiff. In any event, as we noted in our main brief (pp. 35-36), the city was deeply involved in the suspension and discharge of the plaintiff - indeed a number of high ranking supervisory city employees were directly involved in the incident leading to her discharge.

2. Applying the factors set forth in Weise leads ineluctably to a finding of state action. First, contrary to defendant's assertion (Br., p. 58), Yeshiva is totally dependent upon governmental aid (received in the form of a fee under the affiliation contract) for the professional services it provides at Lincoln Hospital. Put quite simply, if Yeshiva did not receive a fee, it would not provide any services. Moreover, the hospital is owned, physically operated, and maintained by municipal funds. Second, the city retained extensive regulatory power and control over nearly all the aspects of Yeshiva's operations at Lincoln Hospital, a fact which the defendant not surprisingly seeks to ignore by focusing solely on the city's control over Yeshiva's employment and discipline practices (Br., p. 57). Aside from the fact that

one must examine the city's involvement with all aspects of Yeshiva's operations at Lincoln Hospital, not just with employment and discipline, the affiliation contract demonstrates that the city was intimately involved with the hiring and firing of Yeshiva employees at Lincoln Hospital. The city had to approve the appointment of most key professional personnel, it exercised "general supervision" over the assignment of interns, it had to be notified in advance of planned absences of directors and supervisors of departments and it had the authority to terminate the services of employees if such employment was "not in the best interests of the city." (See Pltf. Br., pp. 32-33). This extensive supervision and control certainly did not amount to a "hands off" policy as the defendant claims (Br., p. 61). Third, although the city had not specifically directed that the plaintiff be summarily discharged, Mr. Schulman, a city employee who was the Assistant Administrator at Lincoln Hospital in charge of Public Relations, did write to Silverberg immediately prior to the suspension of the plaintiff urging that the plaintiff be discharged. Moreover, the city could have placed in the affiliation contract procedures governing suspensions and dismissals of employees which would have protected the plaintiff's constitutional rights. See Burton v. Wilmington Parking Authority, supra at 725.

Finally, it is the providing of medical services to the general public by Lincoln Hospital that is relevant to the issue of whether Yeshiva's activities serve a public function, see Perez v. Sugarman, 499 F.2d 761, 765 (2d Cir. 1974), and whether Yeshiva is to be considered a private organization. It is difficult to see how, in the 1970s, the providing of free medical care to a vast majority of New Yorkers through extensive use of municipal hospitals can be said to be other than a public function.

Examining individual factors, however worthwhile, cannot accurately portray the comprehensive manner in which the city exercises control over, supervision of and responsibility for nearly every aspect of the professional operation and physical maintenance of Lincoln Hospital. [1] The city is so involved with running Lincoln Hospital that it has truly become a "joint participant in the challenged activity." Burton v. Wilmington Parking Authority, supra.

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[1] The defendant continually refers (Br., pp. 58, 61) to the affiliation contract between the city and Yeshiva as being an "arms length agreement," attempting no doubt to create the image of Yeshiva as an independent entity not under the city's control. However, it is the terms of the agreement, not the fact that it was an arms length agreement, which is important. The agreement of the private corporation in Holodnak to supply the Government with materials was no doubt an "arms length agreement," yet that did not prevent a finding of state action.

B. Liberty and Property Interests

The plaintiff here, an extremely competent professional employee with eighteen years experience, was dismissed for insubordination following a suspension for allegedly engaging in "unprofessional" conduct which tended to "disrupt the effective functioning of the Social Service Department and the activities at Lincoln Hospital." (152a). To argue, as the defendant does (Br., pp. 49-50), that these actions do not affect plaintiff's good name and reputation or cast a "stigma upon her" is to ignore reality. 2/ Labeling a professional employee in plaintiff's position as insubordinate constitutes an infringement of her liberty rights. See Wisconsin v. Constantineau, 400 U.S. 433. Such a label implies that the plaintiff has difficulty dealing with professional relationships in a mature manner and raises serious doubts about her ability to relate both to her clients and her colleagues. In short, it questions her professional judgment, and obviously affects her good name and reputation in the same way as the implication of mental instability affected the policeman in Velger v. Cawley, supra.

2/ The fact that the plaintiff has found another job does not mean, as defendant claims (Br., p. 50, fn. 28), that she has not been stigmatized, for her dismissal and the reasons for it comprise part of her employment record which will obviously be available to any prospective employers. See, Velger v. Cawley, 525 F.2d 334 (2d Cir. 1975); Calo v. Paine, 385 F. Supp. 1198, 1205 (D. Conn. 1974).

Simard v. Board of Education of Town of Groton, 473 F.2d 988 (2nd Cir. 1973) and Russell v. Hodges, 470 F.2d 212 (2nd Cir. 1970), cited by the defendant (Br., p. 51), are not dispositive. Simard involved the dismissal of a non-tenured teacher for failing to carry out normal teaching duties while Russell involved accusations that an employee was derelict in his job by sleeping on duty and being absent without authorization. These cases are a far cry from the situation present here.

The defendant's discussion of property rights (Br., pp. 46-49) also fails. The plaintiff was not an untenured teacher or a probationary employee whose continued employment is contingent upon renewal after a review of performance. Here the plaintiff's position was not conditioned upon a regular review of her employment status. The plaintiff worked at Lincoln Hospital for over 2-1/2 years prior to her suspension and dismissal during which time she was admittedly considered for several responsible positions. Certainly the level of her position, her responsibilities and the length of time she was employed fostered an understanding that she would not be summarily suspended and discharged.

C. Need For a Hearing

The defendant argues (Br., pp. 52-54) that the plaintiff was clearly insubordinate and hence there were no facts

to be decided at a hearing. This argument blithely ignores several crucial and relevant issues which would have been raised at a hearing. [3] First, the suspension and dismissal of Carrion cannot be viewed in isolation. It was part of a series of events at the hospital involving charges and counter-charges between Carrion and other members of the staff as well as alleged threats of a strike by some employees. A hearing, at which Carrion would be guaranteed the right to appear, would have considered all the relevant events, including whether the employees really did threaten to strike if action was not taken against Carrion. [4] Second, a hearing would have decided if Silverberg had authority to suspend the plaintiff without notice and a hearing. Carrion, in her letter of response to her suspension was raising a legitimate issue as to Silverberg's authority to suspend her. If she honestly thought he had no authority to suspend her it is obviously not insubordinate to

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3/ The statement in plaintiff's main brief (p. 46, fn. 32a) regarding testimony which was not admitted by the District Court was not intended, as the defendant claims (Br., pp. 53-54), to serve as an example of the type of evidence which would have been introduced at a hearing. It was intended to demonstrate that the plaintiff had suffered a deprivation of a liberty right.

4/ Although Silverberg claimed he suspended Carrion in part because he feared a strike if he took no action, testimony at the City Commission showed that no such strike threat was made.

question that authority.

Silverberg's letter to Carrion contained no assurance that she would be given the opportunity to present her side of the events occurring at Lincoln Hospital, or to confront those who had made charges against her. To claim that the procedures to be followed by Silverberg amounted to "adequate procedural safeguards" (Def. Br., p. 55) makes a mockery of due process and it is not surprising that Carrion wrote the letter she did. She did not want to present mitigating facts (Def. Br., p. 54); she had the right to challenge the allegations against her in their entirety and that was what she would have done had a hearing been held.

To summarily discharge a professional employee for questioning the authority of the individual who suspended her, for requesting a full investigation of all the events (not just the charges against her as Silverberg's letter stated he would do, 152a), and for refusing to abandon her patients indicates that the defendant eagerly seized upon the plaintiff's letter as an excuse to get rid of her.

CONCLUSION

The Judgment of the court below should be reversed.

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Respectfully submitted,

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